

STATE OF MICHIGAN
COURT OF APPEALS

SUN/FOREST, L.L.C., SUN/FROST
HOLDINGS, L.L.C., SUN/COMMUNITIES
OPERATING LIMITED PARTNERSHIP,
SUNCHAMP, L.L.C., SUNCHAMP HOLDINGS,
L.L.C., SUN COMMUNITIES, INC., GARY A.
SHIFFMAN, and ARTHUR A. WEISS

UNPUBLISHED
March 13, 2007

Plaintiffs-Appellants,

v

TJ HOLDINGS, L.L.C.,

Defendant-Appellee.

No. 262155
Oakland Circuit Court
LC No. 2003-048710-CK

Before: Wilder, P.J., and Kelly and Borrello, JJ.

Wilder, P.J., (*dissenting*).

I would affirm the trial court's conclusion that defendant's claims arising from the operating agreement were not arbitrable, and therefore, I respectfully dissent.

An assignment agreement was entered into by the parties in order to give defendant a membership interest in Sun/Forest, L.L.C. At the same time, the parties executed a separate operating agreement, which established their understanding of the constitution and operation of the company, and the rights and obligations of the members. The assignment agreement contains an arbitration provision, but the operating agreement does not. The relationship soured, and defendant filed a seven-count complaint in North Carolina state court. Around the same time, plaintiffs filed suit in Oakland Circuit Court requesting that the trial court compel arbitration of defendant's claims. The North Carolina suit was stayed pending the outcome of this case.

The trial court ruled that three of defendant's claims were arbitrable, and those claims are not at issue on appeal. The remaining claims allege breach of fiduciary duty, aiding and abetting breach of fiduciary duty, breach of contract, and illegal acts of controlling member/manager. The trial court found that these claims arose out of the operating agreement, and thus, were not subject to the assignment agreement's arbitration clause.

Plaintiffs argue on appeal that defendant's claims are subject to the assignment agreement's arbitration clause because, in plaintiff's view, the operating agreement is expressly

incorporated into the assignment agreement, and further because again in plaintiff's view, defendant's claims arise out of transactions contemplated by the assignment agreement.

Arbitration is a matter of contract, and arbitration agreements are generally interpreted in the same manner as ordinary contracts. *Bayati v Bayati*, 264 Mich App 595, 599; 691 NW2d 812 (2004). In order to effectuate the intent of the parties, arbitration agreements must be enforced according to their terms. *Id.* A party cannot be required to submit to arbitration a matter that he has not agreed to submit. *Amtower v William C Roney & Co (On Remand)*, 232 Mich App 226, 234; 590 NW2d 580 (1998).

The arbitration provision of the assignment agreement provides, "[i]n the event of any dispute concerning this Assignment or any of the transactions contemplated hereby, the parties agree to submit such dispute to binding arbitration." However, there is no similar arbitration provision in the parties' operating agreement. The operating agreement merely notes that defendant purchased a membership interest in the company simultaneous to the execution of the operating agreement. Where there is neither a physical attachment nor specific language incorporating a document by reference, the incorporating instrument must clearly evidence an intent that the writing be made part of the contract. *Forge, supra* at 207 n 21. The operating agreement does not clearly evidence an intent to incorporate the terms of the assignment agreement, specifically, the arbitration provision. In other words, the oblique reference to the assignment agreement contained in the operating agreement recital does not clearly evidence an intent that the assignment agreement provisions be made part of the operating contract. Therefore, the operating agreement does not expressly incorporate the assignment agreement. Consequently, plaintiffs' argument fails on the first prong of the inquiry, there is no arbitration provision in the parties' operating agreement contract. Thus, claims under that agreement are not subject to contractual arbitration.

Moreover, the assignment agreement provides that "[t]he Operating Agreement and this Assignment, . . . [are] enforceable against [plaintiffs] in accordance with their respective terms." The arbitration clause is a term of the assignment agreement, but not the operating agreement. Therefore, defendant's claims are expressly excluded from arbitration, and I would affirm.

/s/ Kurtis T. Wilder